

STATE OF MICHIGAN
IN THE SUPREME COURT

* * * *

DANIEL KNUE and JACQUELINE KNUE,

Plaintiffs/Appellees,

vs.

CORNELIUS "CASEY" SMITH,
JOAN SMITH and STEVE SMITH,

Defendants/Appellants.

Supreme Court No. ~~130337~~

Court of Appeals No. 255702

Ottawa County Circuit Court
Case No. 02-043890-CE

130377
Supp

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APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL OR PEREMPTORY ACTION

FILED

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COUNTER-STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM
AND INDICATING THE RELIEF SOUGHT

Plaintiffs/Appellees stand by the counter-statement identifying the judgment appealed from and indicating the relief sought provided in their original Brief in Opposition to Application for Leave to Appeal.

STATEMENT OF SUPPLEMENTAL QUESTIONS PRESENTED

Plaintiff/Appellees have chosen to answer the supplemental questions issued by the Court in reverse order because, as illustrated by Appellees' "Argument", an affirmative answer to the question "whether Plaintiffs' counsel's letter was an offer of judgment under MCR 2.405(A)..." tends to aid the proposition that attorneys fees and costs may be assessed pursuant to MCR 2.405(D) in a case involving an equitable claim to quiet title.

I. Was the \$3,000.00 offer in Plaintiffs' counsel's letter of May 16, 2003 an offer of judgment under MCR 2.405(A)(1), in light of the rule's requirement of a "sum certain," and given Plaintiffs' additional demand for a quitclaim deed?

- a. Defendants-Appellants' answer, "no."
- b. Plaintiffs-Appellees' answer, "yes."
- c. The Court of Appeals would answer, "yes."
- d. The trial court would answer, "yes."

II. May attorney's fees and costs be assessed pursuant to MCR 2.405(D) in a case involving an equitable claim to quiet title?

- e. Defendants-Appellants' answer, "no."
- f. Plaintiffs-Appellees' answer, "yes."
- g. The Court of Appeals would answer, "yes."
- h. The trial court would answer, "yes."

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiffs/Appellees stand by the counter-statement of material facts and proceedings provided in their original Brief in Opposition to Application for Leave to Appeal.

**COUNTER-STATEMENT OF STANDARD FOR GRANTING LEAVE TO
APPEAL**

Plaintiffs/Appellees stand by the counter-statement of standard for granting leave to appeal provided in their original Brief in Opposition to Application for Leave to Appeal.

**COUNTER-STATEMENT OF STANDARD OF REVIEW IN SUBSTANTIVE
APPEAL**

Plaintiffs/Appellees stand by the counter-statement of standard of review in substantive appeal provided in their original Brief in Opposition to Application for Leave to Appeal.

ARGUMENT

I.

THE \$3,000.00 OFFER IN PLAINTIFFS' COUNSEL'S LETTER OF MAY 16, 2003 WAS AN OFFER OF JUDGMENT UNDER MCR 2.405(A)(1) AND CONSTITUTES A "SUM CERTAIN" AS REQUIRED BY THE RULE EVEN THOUGH PLAINTIFFS ALSO DEMANDED A QUITCLAIM DEED.

Pursuant to the rule, "offer" is defined as:

"a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued." MCR 2.405(A)(1).

Plaintiffs' offer of judgment pursuant to MCR 2.405 reads as follows, a copy of same is attached hereto and incorporated herein as **Exhibit 1**:

Re: Knue v Smith, et al.
Case No. 02-43890-CE
Rule 2.405 Offer to Stipulate to Entry of Judgment

Dear Mr. Karafa:

Please accept and transmit this offer to your clients for Stipulation of entry of Judgment.

My clients are willing to stipulate to the entry of Judgment in the following manner:

1. Your clients transfer by Quit Claim Deed the disputed property as described in the survey of Holland Engineering, being approximately 1,032 square feet in a generally triangular plot of land;
2. In return for the transfer of the property, my clients will pay in cash or cash equivalent the sum of \$3,000.00 delivered to you and made payable as you direct;
3. All claims asserted by both sides dismissed with prejudice and without costs.

Please transmit this offer to your clients, and accept or reject said offer within 21 days as required under MCR 2.405.

Case law establishing what constitutes an “offer” and a “sum certain” with respect to MCR 2.405 is fairly sparse. Precedent offers even less guidance in determining whether the rule applies to actions equitable in nature. In no case has a Michigan Court ever determined that MCR 2.405 does not apply to an offer consisting of a “sum certain”.

The Court of Appeals decision in Hessel is an appropriate starting point for discussion. In Hessel, the Defendant offered a proposed property settlement that included real estate, a car, household furnishings, and certificates of deposit that would presumably vary in worth depending on when they were withdrawn. Hessel v. Hessel, 168 Mich. App. 390, 424 N.W.2d 59 (1988). Continuing, the defendants’ valuation of the property varied substantially from the determination made by the Court. As a result, the Court explained, “In no sense of the phrase can these items be equated with a sum certain.” Id.

In Hessel, the Court of Appeals ultimately determined that MCR 2.405 does not apply to proposed property settlements in divorce proceedings. The catalyst for such a decision was explained by the Court of Appeals in Defendants’ preceding appeal; “in Hessel, this Court noted that a proposed property settlement does not offer a sum certain, but a division of marital property.” Knue v. Smith, 269 Mich. App. 217, 711 N.W.2d 84 (2005). Therefore, the Court of Appeals in Knue determined that MCR 2.405 was not applicable in Hessel not merely because a division of marital property was at issue, but more importantly because the offer itself did not constitute a “sum certain”.

In the instant matter, neither a division of marital property nor the value of marital property is or ever was at issue. The attempted offer in Hessel was an effort to divide an “apple” whose separate wedges held an unascertainable value, therefore the offer failed as a sum certain. Here, splitting the apple was never an issue, rather Plaintiffs’ offer

contained a direct proposition; an apple for an orange (judgment in Plaintiffs' favor for a sum certain of \$3000.00). Pursuant to the reasoning in Hessel, Plaintiffs' offer here was for a "sum certain" consistent with the requirements of MCR 2.405.

Further guidance is offered by the Court of Appeals in Best Financial Corp. v. Lake States Ins. Co., 245 Mich. App. 383, 628 N.W.2d 76 (2001). The "offer" at issue in Best Financial was conditioned on dismissal with a confidentiality agreement and a termination of the relationship between the parties.

While Best Financial is clearly distinguishable from the instant matter because the letter in Best Financial was found to be nothing more than a continuation of settlement discussions and therefore not an offer pursuant to MCR 2.405, the Court set forth parameters to aid in the determination of whether an "offer" constitutes a "sum certain."

Although an offer need not be in any particular form, it must be in writing and contain an unconditional offer to stipulate to the entry of judgment in a sum certain.

Defense counsel's letter at best indicates a willingness to stipulate the entry of a judgment with particular conditions attached and therefore fails to comply with the requirements of MCR 2.405. Because of the insistence on conditions, the offer, if any, was not for a "sum certain" as required by MCR 2.405. Best Financial Corp. v. Lake States Ins. Co., 245 Mich. App. 383, 628 N.W.2d 76 (2001).

Defendants', in their Application for Leave to Appeal and in reliance on Best Financial state the following:

"...plaintiffs' counsel's May 13, 2004 letter to defense counsel did not constitute an "offer" under MCR 2.405 because it contained conditions separate from simply dismissing the claims. The letter expressly conditioned the \$3000.00 offer not simply on dismissing both plaintiffs' and defendants' claims but on defendants transferring their interests in the disputed property to plaintiffs by quit claim deed. Thus, the transfer of ownership interest in the disputed property was a condition of defendants' receiving monetary compensation." **Defendant's Application for Leave to Appeal**, p. 22.

This argument is clearly flawed. It is important to note that the “offer” at issue in Best Financial was that of the Defendant’s, unlike the offer involved in the instant matter. Based on Defendants’ reasoning, Plaintiffs’ offer would only constitute a “sum certain” and therefore an “offer” under MCR 2.405 if it were to have read; “Plaintiffs offer \$3000.00 in exchange for a dismissal of all claims involved.” This logic is ill founded and not within the contemplated purpose of the statute which is to encourage parties to seriously engage in the settlement process and avoid prolonged litigation. Why would Plaintiffs, whose confidence in their claim was affirmed by the trial court, ever offer Defendants a sum of money to dismiss all claims without receiving anything in exchange?

Plaintiffs’ offer, in no way, shape or form, indicated a willingness to stipulate to the entry of a judgment with particular conditions attached. Judgment requested of the trial court by Plaintiffs in their complaint was to “quiet title (to) the disputed property and determine ownership to be in the Plaintiffs.” **Plaintiff’s Complaint**, pg 5. Plaintiffs, in their May 16, 2003 offer of judgment, used the language “quit claim deed the disputed property” and “transfer of the property” as opposed to “judgment in Plaintiffs’ favor”. The language is synonymous and is a direct reflection of the relief requested by Plaintiffs in their Complaint. This author has found no case law stating that an offeror must use the term “judgment” in their offer. To the contrary and pursuant to Best Financial, “an offer need not be in any particular form.” Id at 388.

Unlike the offer involved in Best Financial, Plaintiffs offer was neither a continuation of settlement negotiations nor conditional, but was an offer to Defendants of

a sum certain, \$3000.00, in exchange for judgment in their favor. Therefore, Plaintiffs' offer was consistent with MCR 2.405 and established case law.

Additional authority exists supporting the contention that Plaintiffs' offer was consistent with MCR 2.405. In Central Cartage Co. the Court of Appeals ruled that an offer conditioned upon payment in installments rather than a lump sum was a "sum certain" appropriate under MCR 2.405. Central Cartage Co. v. Fewless, 232 Mich.App. 517, 591 N.W.2d 422 (1998). Continuing, an offer for \$225,000.00 that included an agreement that the sum would resolve all past, present, and future claims between the parties was held to be an offer for a "sum certain" consistent with MCR 2.405. Richert v. Pounders, unpublished opinion per curiam of the Court of Appeals, decided August 20, 1996 (Docket No. 175480) (1996 WL 33360428) *2 (Mich. App. 1996) (copy attached). Finally, an offer of "500 plus costs attributable to those portions of plaintiffs' complaint that were not dismissed" has been deemed a "sum certain" and within the requirements of the rule. Wilkins v. Gagliardi, 219 Mich.App. 260, 274, 56 N.W.2d 171.

Thus, Plaintiffs' offer, \$3000.00 in exchange for favorable judgment, was an offer of judgment for a sum certain as required by MCR 2.405. This point was neither missed nor misinterpreted by the Court of Appeals and was appropriately summed up as follows: "The Knues offered to pay the Smiths \$3000.00 in exchange (for) an entry of judgment in their favor. Therefore, we conclude that, while there was property involved in this case, the offer was for \$3000, a sum certain." Knue v. Smith, 269 Mich. App. 217. A copy of the Court of Appeals' Opinion is attached hereto and incorporated herewith at **Exhibit 2**.

II.

ATTORNEYS FEES AND COSTS MAY BE ASSESSED PURSUANT TO MCR 2.405(D) IN A CASE INVOLVING AN EQUITABLE CLAIM TO QUIET TITLE.

In no case has a Michigan Court ever determined that MCR 2.405 does not apply to matters generally equitable in nature and more specifically to a claim to quiet title. As a result, this question before the Court appears to be a case of first impression. While considering this issue, Plaintiffs remind the Court that the purpose of the offer of judgment rule is to encourage settlement and to deter protracted litigation. Central Cartage Co., 232 Mich.App.at 533 (1998); Wilkins, 219 Mich.App. 24 at 274 (1996); Hanley v. Mazda Motor Corp., 239 Mich.App. 596 at 603, 609 N.W.2d 203 (2000); Reitmeyer v. Schultz Equipment & Parts Co., Inc., 237 Mich.App. 332 at 341, 602 N.W.2d 596 (1999); Luidens v. State of Michigan 63rd District Court, 219 Mich.App. 24 555 NW.2d 709 at 713 (1996); Auto Club Ins. Ass'n v. General Motors Corp., 217 Mich.App. 594 at 598, 552 N.W.2d 523.

MCR 2.405 does not discriminate based upon whether the underlying case is one based in equity or in law. This fact has been acknowledged by the Court of Appeals in an unpublished opinion, Blessing v. Christensen, unpublished opinion per curiam of the Court of Appeals, decided May 21, 2002 (Docket No. 228451) (2002 WL 1040576 (Mich.App. 2002)) (copy attached) at *5 ("there is no distinction between equity and damages in MCR 2.405(D)"); *see also*, Sandstone Investment Co. v. City of Romulus, unpublished opinion per curiam of the Court of Appeals, decided August 20, 1999 (Docket No. 205476) (1999 WL 33437837 (Mich.App. 1999)) (copy attached) at *5-*6 (awarding MCR 2.405 sanctions where both an equitable claim for specific performance

in addition to a claim for money damages were at play in the underlying litigation)¹; and Cf. Central Cartage Co., 232 Mich.App. at 530-534 (awarding MCR 2.405 sanctions arising out of litigation involving both an equitable cause of action and a demand for monetary relief).

As discussed above, the Court of Appeals, in Hessel, as explained by the Court in Knue, ruled that the Defendant's offer consisting of items of property of unascertainable value was not an offer for a "sum certain" and therefore held that MCR 2.405 did not apply. Hessel also stated additional reasons for not applying the rule.

First, the Court stated, "We doubt that the Supreme Court intended the property settlement provisions of a divorce judgment constitute a "verdict"." Hessel, 169 Mich. App. 390, 395 (1988). MCR 2.405(A)(4), defines a "verdict" as (a) a jury verdict, (b) a judgment by the court after a nonjury trial, and (c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment. MCR 2.405. The ruling of the trial court in this case was a "verdict" under the rule because it was a judgment by the court after a nonjury trial.

Continuing, the Hessel Court determined that the policy behind MCR 3.211 governing domestic relations mediation (of not allowing sanctions against either party for

¹ The trial court used Standstone as persuasive authority in ruling in Plaintiff's favor and stated the following: "In that case, the plaintiff claimed that the defendant's offer of judgment was not an offer to stipulate to the entry of a judgment in a "sum certain" as required by MCR 2.405 because it addressed plaintiff's equitable claim for specific performance in addition to the claim for monetary damages. This is strikingly similar to the situation in the present case, in which the plaintiffs' offer for Stipulation of judgment addressed their equitable claim of acquiescence, as well as a monetary award in the amount of \$3000. In Sandstone, the Court held that "Defendant's offer of judgment complied with MCR 2.405(A)(1) because it clearly indicated defendant's willingness to stipulate to the entry of a judgment of a sum certain, \$20,000." The plaintiffs' letter clearly expressed a willingness to stipulate to the entry of judgment of a sum certain in the amount of \$3,000. The inclusion of the equitable claim in the offer does not take it outside the scope of MCR 2.405. This determination is supported by Blessing v Christensen, unpublished opinion per curiam of the Court of Appeals, decided May 21, 2002 (Docket No. 228451 (2002 WL 1040576 (Mich App 2002)) which held that there is no distinction between equity and damages in MCR 2.405(D) or MCR 2.406 (A)." (Trial court opinion and order pgs. 3-4) A copy of which is attached to Appellees' Brief in Opposition of Leave to Appeal.

accepting or rejecting the recommendation) applied to a domestic relations case involving an offer to stipulate to the entry of judgment under MCR 2.405. Id. at 396. There is no such court rule applicable to equitable matters in general or those involving claims to quiet title. As a result, a similar extension of the reasoning in Hessel cannot be made to this case.

Defendants, in support of their attempted extension of Hessel to the present case, present yet another ill-founded argument to the Court:

The inapplicability of the offer of judgment rule to quiet title actions is easily demonstrated by the fact that *the dollar amounts will always be meaningless*. The whole point of the offer of judgment rule is to encourage the parties to try to assess the value of the case, to predict a verdict, then present offers and counter-offers in an attempt to agree on the case's worth and resolve it for that amount. *Disputes over title to real property are simply not susceptible to this process because they are not disputes about money*. Under the Court of Appeals opinion, so long as a party in a quiet title action offers any monetary amount, regardless of whether it has any correlation to the value of the property (or the strength of the offeror's position) if the offering party prevails and title is quieted in favor of that party, *that party will be entitled to attorney fees*. (emphasis added). Defendant's Application for Leave to Appeal, pg. 19.

This counsel persuades the Court to contemplate whether a wrongful death case is strictly a dispute about money. What about personal injury, intentional infliction of emotional distress, defamation, slander or medical malpractice? These situations are disputes about the loss of life, mental injury, physical injury and injury to one's reputation, upon which some monetary value is suggested and disputed. The value placed on such claims, if any, is not always representative of the actual injury suffered. As a result, the offer of judgment rule encourages parties to assess the relative value of a Plaintiff's claim, evaluate the strength of each other's positions, and engage in offers and counteroffers to resolve a dispute to reduce cost and further judicial efficiency and

economy. It is unlikely, without the sanctions imposed by the rule (e.g. sanctions against gamesmanship), that offers would be taken seriously and resolution would occur.

To effectuate its purpose, MCR 2.405 must apply to equitable causes of actions such as one to quiet title as involved here. As in this case, a quiet title action often involves a prayer for relief to have a particular piece of property awarded to a Plaintiff. In a similar fashion to the tort issues discussed above, the parties must assess the relative value of the claim and consider the strength of each party's position. Only then can meaningful offers and counteroffers of judgment ensue.

For the sake of argument, assume that a Plaintiff brings an action to quiet title to a one acre parcel between P and D's property. Also assume that each party reasonably believes they have a 50% chance of prevailing on the merits at trial. Further assume that the parties are in similar financial positions and are equally risk adverse. Plaintiff proposes an offer of judgment of \$500.00 in exchange for judgment in her favor (title to the disputed property). Defendant, knowing that similar property in the area is worth \$1000.00 an acre, proposes a counteroffer of \$1500.00 to enter judgment in Plaintiff's favor. The point being, parties who take the rule seriously in a quiet title action are likely to engage in meaningful offers and counteroffers of judgment and therefore avoid prolonged litigation consistent with the rule's purpose.

Defendants, based on their reasoning above, would propose an alternative hypothetical to attempt to show the Court that the rule should not apply to equitable actions to quiet title. Defendants would argue; what if P offered D \$25.00 in exchange for judgment in her favor, and D, repulsed by such a ridiculous "offer" rejects and is disinclined to counter and would rather litigate because he is now offended. Defendants

would argue that if P wins at trial, he *will be entitled to attorneys fees even though his offer had no correlation to the value of the real property.*

Plaintiffs argue that Defendants' concern is already addressed under the rule. The "interest of justice" exception contained in MCR 2.405(D)(3) is a control device set up by the authors of the rule to allow a court to avoid awarding sanctions pursuant to the rule where doing so would be inequitable. "The exception should be exercised where it would remedy offers of judgment made for gamesmanship purposes rather than as a sincere effort at negotiation." Luidens v. 63rd District Court, 219 Mich. App. 24; 55 N.W.2d 709 (1996).

In the second hypothetical, a court would rule that P utilized the offer of judgment rule for "gamesmanship purposes" and would refuse the award of sanctions in the interest of justice. Defendants' contention that disputes over title to real property are not susceptible to this process (MCR 2.405) because they are not disputes about money and that a party who makes an offer, whether or not it is reasonable, will always be entitled to attorneys fees if they win, are misplaced. Pursuant to the purpose of the rule and the intent of its drafters, MCR 2.405 should apply to equitable actions to quiet title.

The Court of Appeals in the instant matter properly identified the unique issue that sometimes arises with the offer of judgment rule as it relates to equitable claims. "The difficulty with offers involving equitable claims arises in valuing the offer against the verdict to determine whether the offer was more or less than the verdict." Knue v. Smith, 269 Mich. App. 217 (2005).

In the matter before this Court, no such complication exists. Although redundant, Plaintiffs offered Defendants \$3000.00 for title to the property at issue. Defendants declined the offer and the trial court ultimately awarded Plaintiff \$699.26, title to the

property against Defendants and awarded no cause of action to Plaintiffs on Defendants' counterclaims. Neither the Court of Appeals nor this author can find any complication in determining whether Plaintiffs' offer was more or less than the verdict.

A similar result can be anticipated in quiet title actions in general. Therefore, attorneys fees and costs may be assessed pursuant to MCR 2.405(D) in a case involving an equitable claim to quiet title, as long as the offer is a "sum certain".

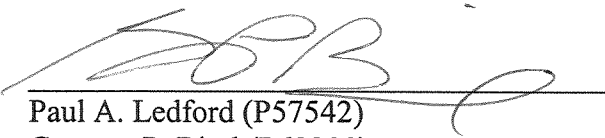
RELIEF REQUESTED

Based on the preceding argument, Plaintiffs respectfully request that this Honorable Court deem Plaintiffs' May 16, 2003 letter an "offer" for a "sum certain" consistent with MCR 2.405 and further, agree with Plaintiffs that in order to uphold the spirit and integrity of the policy behind the rule, MCR 2.405 should apply to an equitable claim to quiet title.

As a consequence, Plaintiffs request that this Court deny Defendants' application for leave to appeal and refrain from peremptory action inconsistent with the Court of Appeals' Decision in this case.

Respectfully submitted,
LEDFORD & ASSOCIATES

Dated: October 12, 2006



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